

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

RAJA KANNAN,) Case No. 17-cv-07305-EJD
)
Plaintiff,) San Jose, California
) Wednesday, November 20, 2019
v.) Courtroom 2, 5th Floor
)
APPLE INC.,)
)
Defendant.)
_____)

TRANSCRIPT OF DISCOVERY HEARING
BEFORE THE HONORABLE VIRGINIA K. DeMARCHI
UNITED STATES MAGISTRATE JUDGE

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1 SAN JOSE, CALIFORNIA WEDNESDAY, NOVEMBER 20, 2019 10:01 A.M.

2 --oOo--

3 (Call to order of the Court.)

4 THE CLERK: Calling the matter of Kannan v. Apple, Case
5 Number 17-cv-07305.

6 THE COURT: Your appearances, please.

7 MS. FORD: Karen Ford for Plaintiff Kannan.

8 THE COURT: Good morning.

9 MR. BOYER: Good morning, Your Honor. Todd Boyer for
10 Apple.

11 THE COURT: Good morning. All right. Today I'm going
12 to hear argument about two discovery disputes. The first is
13 Apple's motion regarding Mr. Kannan's alleged failure to comply
14 with the Court's prior discovery orders regarding evidence of
15 software development work by Mr. Kannan and regarding Mr. Kannan's
16 family's time in India. That's Docket Number 184.

17 And then I'll also hear argument about the parties' disputes
18 about Apple's "Attorney's Eyes Only" or AEO designations, and
19 that's at Docket Number 198.

20 So first let me begin with Docket Number 184 and that's
21 Apple's motion regarding the application development issue and the
22 time in India. I have a number of questions for you, Mr. Boyer.

23 MR. BOYER: Yes.

24 THE COURT: First of all, can you describe for me
25 comprehensively how the information about Mr. Kannan's software

1 development work is relevant to a claim or defense in the case?

2 MR. BOYER: Yes, Your Honor. So Plaintiff claims in his
3 complaint that Mr. Kotni discriminated against him because of him
4 because of his son's autistic condition. Part of the claim is
5 that Mr. Kotni -- it's alleged that Mr. Kotni believed that Mr.
6 Kannan was not responding to things as quickly and not performing
7 as well because he was taking care of his son. And because of
8 this, this led to -- this is part of the discriminatory conduct
9 that Plaintiff alleges.

10 THE COURT: Uh-huh.

11 MR. BOYER: The fact that his family was in India -- and
12 we found out at his deposition a few weeks ago -- his family was
13 in India for most of the time that he worked for Mr. Kotni. So
14 from 2014, during the school year -- so essentially his family was
15 only in the United States during the summer. And that's really
16 important because --

17 THE COURT: During the summer of which year?

18 MR. BOYER: All -- everything --

19 THE COURT: Just successive years?

20 MR. BOYER: -- 2014, 2015, 2016, and then -- actually,
21 in 2016, they left permanently. So the fact that he has never
22 taken care of his son goes to, one, the discrimination claim, but
23 he also has an FMLA interference claim. And obviously he would
24 not need any sort of leave if his child is not even in the
25 country. So it goes to both claims really.

1 THE COURT: All right. I'm asking about the software
2 development issue.

3 MR. BOYER: Oh, I'm sorry. Okay.

4 THE COURT: That doesn't tell me anything about the
5 software development issue. So how does the -- that work that
6 you're seeking discovery about relate to a claim or defense?

7 MR. BOYER: Okay. So the software development part of
8 it goes to really two defenses. First, I would have to apply that
9 evidence defense in that software development work for third
10 parties is prohibited by Apple's policy and would result in the
11 termination of his employment had they discovered it early on.

12 THE COURT: Okay. Even if they're doing it on their own
13 time?

14 MR. BOYER: Correct.

15 THE COURT: Okay. All right. So basically your
16 argument is the relief that Mr. Kannan says he's entitled to, he's
17 not actually entitled to because had he known, he wouldn't have
18 been entitled to even retaining his employment. He would have
19 been let go or at least admonished. He wouldn't be entitled to
20 promotions or additional responsibility or additional stock awards
21 or compensation?

22 MR. BOYER: That's exactly right.

23 THE COURT: Is that your thesis? Okay. Is that the
24 only reason? Is that the only -- or is there another?

25 MR. BOYER: There is one more, Your Honor.

1 THE COURT: Okay.

2 MR. BOYER: And, again, this goes to the same issue with
3 regard to the claim that Mr. Kannan was not responsive enough and
4 that Mr. Kotni perceived that Mr. Kannan was not responsive enough
5 because of his son's condition that he was taking care of him and
6 things like that.

7 So why is that relevant? Because if he was developing and
8 actually working on these third party applications instead of his
9 Apple duties, well, that would explain why he wasn't necessarily
10 responsive. It would be another reason for Mr. Kotni's alleged
11 perception that he wasn't responsive enough.

12 THE COURT: Okay. And I believe that the request for
13 production that you are principally relying on or exclusively
14 relying on is Request for Production 18?

15 MR. BOYER: Eighteen and 19, yes, Your Honor.

16 THE COURT: So 19 I've already ruled on.

17 MR. BOYER: Yes, Your Honor.

18 THE COURT: You're not entitled to get discovery of Mr.
19 Kannan's wife's software development work.

20 But Request for Production Number 18 is permitted. You
21 mentioned in your part of the joint submission that Apple had
22 discovered documents on its own.

23 MR. BOYER: Correct.

24 THE COURT: Which documents are those and what do they
25 show?

1 MR. BOYER: Okay. So they are attached as exhibits.

2 THE COURT: Are these exclusive? I've looked at the
3 exhibits. So were these just examples, or is this sort of
4 comprehensive?

5 MR. BOYER: These are examples that we felt prove that
6 Mr. Kannan was working in app development at the time he was
7 employed with Apple and that he was not producing -- he certainly
8 didn't produce the documents that we submitted to the Court, but
9 also has not looked in other sources for those productions related
10 to app development.

11 THE COURT: And when did Apple discover those documents,
12 the documents -- examples of which are attached to your
13 submission?

14 MR. BOYER: Sure, in late October, when we were looking
15 for documents responsive to Request for Production Numbers 72
16 through 74 from Plaintiff, which are related -- in which Plaintiff
17 seeks documents showing potential policy violations or misconduct.

18 THE COURT: All right. And what is the source of the
19 material for these documents? Is this the mirror image of the
20 laptop computer?

21 MR. BOYER: That's correct, Your Honor.

22 THE COURT: Okay. Why didn't you search for these
23 documents earlier?

24 MR. BOYER: So we -- so we did. We just didn't find
25 them. There are about -- multiple thousands of documents on his

1 computer and when initially we looked -- certainly we listed the
2 entire set and that's in the July 8th letter that we sent to
3 counsel. There's thousands and thousands of files on his
4 computer. And when we went and looked again, Plaintiff's counsel
5 specifically asked for -- "I don't want 10,000 documents. I want
6 essentially the meat of it. What are you really going to show?"
7 And I said, "Well, we've got, you know, all these documents."
8 "We'll get you, you know, the highlights."

9 THE COURT: Are we talking now about evidence of the
10 software development work that -- okay. You're not talking about
11 Document Request 72 -- I mean, I guess they relate. But when I
12 ask about why didn't you look for -- maybe I should ask it
13 differently.

14 Did you look for documents that would evidence Mr. Kannan's
15 software development work for others earlier in the case, or did
16 you only look for those in October of 2018?

17 MR. BOYER: So we did and we listed all the documents.
18 And there are, again, thousands of them. And so we did not look
19 through every document at that time. We asked Plaintiff to
20 produce documents related to app development. And then we wanted
21 to take his deposition to dive into it and find out, you know,
22 what this was and -- but, unfortunately, we weren't able to do
23 that because we had to --

24 THE COURT: Okay. But you had all of the documents on
25 this mirror image of the laptop computer since the beginning of

1 the lawsuit. Yes?

2 MR. BOYER: Yes, Your Honor.

3 THE COURT: Okay. I'm sorry. You're nodding and we're
4 making an audio recording.

5 MR. BOYER: Yes, Your Honor.

6 THE COURT: So forgive me. I am going to require a
7 response. All right. So at this point, what more do you need by
8 way of discovery on this particular issue?

9 MR. BOYER: Yes, Your Honor.

10 THE COURT: Document discovery on this particular issue.

11 MR. BOYER: So a couple of things. One, initially, when
12 we were here on September 24th, the Court said to Plaintiff's
13 counsel, Please start looking through your client's data. So that
14 includes the gmail account. That includes the computer itself.
15 What we believe exists, number one, is emails in his gmail account
16 related to software development.

17 Now, the reason they haven't produced this is because they're
18 saying, Well, this is related to his wife's, and so we don't have
19 to. But if he's directly involved in it, Request Number 18
20 certainly requests that.

21 THE COURT: Okay. Yeah. So I'm just kind of focusing
22 on what you need. So gmail?

23 MR. BOYER: Gmail searches.

24 THE COURT: Uh-huh.

25 MR. BOYER: I would also like to subpoena the company

1 that we identified that he worked for and Kickstarter as well
2 because he submitted an application to Kickstarter for development
3 of the application -- I'm sorry -- for funding of that
4 application.

5 THE COURT: All right. Let me just -- let me make my
6 question more precise. What discovery do you need from Mr.
7 Kannan?

8 MR. BOYER: Okay.

9 THE COURT: Besides gmail.

10 MR. BOYER: Okay. Gmail searches and searches of any
11 other electronic sources that would have data related to his app
12 development. So he testified at his deposition that he had
13 another laptop. That wasn't -- I do not believe that was
14 searched. The gmail account -- any other email accounts that he
15 would have used to communicate regarding app development.

16 THE COURT: All right. Is there anything else from Mr.
17 Kannan?

18 MR. BOYER: And -- well, I'd like to continue asking
19 questions, but I didn't finish his deposition.

20 THE COURT: So has Apple ever proposed any search terms
21 or search methodology for searching ESI in this case with respect
22 to this software development issue?

23 MR. BOYER: We have not, Your Honor.

24 THE COURT: Have the parties ever discussed an ESI
25 protocol for any aspect of the ESI at issue in the case? You

1 don't have an existing one, in other words?

2 MR. BOYER: We do not.

3 THE COURT: Okay. All right. One of the things that
4 you asked for by way of relief in this motion is to have a third
5 party review Mr. Kannan's electronic material. The motion focuses
6 principally on email, maybe exclusively on email. What is the
7 nature of the search that you expect this third party to do?

8 MR. BOYER: What we would do is propose specific terms
9 based on the documents that we have found, and that that
10 individual -- I'm sorry, the third party -- will look through any
11 electronic source, whether email or otherwise, for information and
12 responsive documents related to his application development.

13 THE COURT: All right. But those terms haven't been
14 proposed at this point?

15 MR. BOYER: I have not yet.

16 THE COURT: Okay. All right. I have some questions for
17 Ms. Ford. I'll let you add anything that you wish after I'm done
18 asking her some questions.

19 All right. So, Ms. Ford, I'm focusing on Request for
20 Production Number 18 which is the request that seeks "All
21 documents concerning, reflecting, or relating to your [meaning Mr.
22 Kannan's] development of any mobile, web, or other software
23 application during your employment with Apple for August 29th,
24 2011 to the present."

25 When you responded to this Request for Production on behalf

1 of Mr. Kannan -- or, rather, when he responded -- there were
2 objections asserted on the basis of privilege and privacy,
3 vagueness and overbreadth, and the fact that Apple had the
4 material in its possession.

5 But then Mr. Kannan represented the following: "Without
6 waiving said objections, Plaintiff did not develop any mobile,
7 web, or other software application during his employment with
8 Apple from August 29th, 2011 through the present," and then in
9 bold text, "Raja, is this last sentence correct?" That was the
10 response that was presented to the Court in a prior submission.

11 And Mr. Kannan has represented on subsequent occasions that
12 he has produced responsive documents and those concern only the
13 application -- applications that Mr. Kannan developed for Apple
14 and that he hasn't developed any other applications, so there are
15 no other responsive records.

16 And that representation was made very explicitly in the
17 declaration that was filed at Docket Number 160. So did Mr.
18 Kannan do any software application development work for anyone
19 other than Apple?

20 MS. FORD: Well, I guess that depends on whether you buy
21 Apple's characterization of what he did as being development, as
22 being app development.

23 THE COURT: Did he work on any software applications?

24 MS. FORD: He did not write any code or work on any
25 software applications is my understanding from him.

1 THE COURT: He did no work for Tringio?

2 MS. FORD: I'm sorry?

3 THE COURT: Tringio.

4 MS. FORD: No. That's his wife's company. No.

5 THE COURT: He did no software application work for Kno?

6 MS. FORD: No. He did not.

7 THE COURT: He did no software application work for any
8 other company besides Apple?

9 MS. FORD: He testified to these issues during his
10 deposition (indiscernible).

11 THE COURT: I have to say I can't -- I can't resolve the
12 inconsistency between that representation that you just made and
13 the representation that he made and what I see in the papers. It
14 seems inconsistent.

15 Just a moment. Let me just ask you a question about the
16 search. So Mr. Boyer is saying -- maybe you do have a dispute
17 about the characterization of these things. Let's just put a pin
18 in that. Did you search or have a vendor search Mr. Kannan's
19 gmail and his electronic documents for information responsive to
20 Request for Production 18?

21 MS. FORD: The answer to that is yes. He did look
22 through his gmail.

23 THE COURT: No, not him. You personally --

24 MS. FORD: No.

25 THE COURT: -- or a third party vendor?

1 MS. FORD: I did not do that and, no, we did not request
2 a third party vendor to do that.

3 THE COURT: Have you ever looked at his gmail --

4 MS. FORD: Yes.

5 THE COURT: -- for responsive documents?

6 MS. FORD: Yes, I have.

7 THE COURT: And how -- how -- I understand. How did you
8 do that?

9 MS. FORD: We were on the telephone and he had the
10 ability to reflect the screen of his computer on my computer so
11 that I could watch --

12 THE COURT: So he shared the screen with you?

13 MS. FORD: Yeah, and then I could watch him do searches.

14 THE COURT: And I take it Mr. Kannan has preserved all
15 of his electronic -- his gmail and any other email accounts that
16 would be connected to this lawsuit?

17 MS. FORD: Well, I would say that he would have done so
18 with anything connected to this lawsuit. Remember, this whole
19 question of app development was raised quite late in the game --
20 three and a half years after the case was filed or three years
21 after the case was brought -- so that he would have no way of
22 knowing in 2016 or '17, you know, '18 for that matter, that in
23 July of 2019, all of a sudden this issue would be raised about him
24 supposedly engaging in app development. There's nothing about it
25 in the answer. There was nothing about it in response to our

1 interrogatories. There was no -- there was no hint that that was
2 the case.

3 So could it be that he has deleted -- one thing you have to
4 understand about these apps, a couple things you should
5 understand. Number one, we're not talking about Minecraft or any
6 (indiscernible) here. He spends his life work on very small
7 rudimentary apps.

8 When I took Mr. Carr's deposition, the 30(b)(6) witness for
9 Apple, he testified that he couldn't find any indication that any
10 money was ever made on any of these. And I think these are --

11 THE COURT: You know, I appreciate that you may think
12 this is an insignificant thing. But I'm really just trying to
13 focus on documents responsive to the request.

14 MS. FORD: Yes.

15 THE COURT: You all can slog this out on the merits
16 later. I'm not going to decide the merits of whether it is or is
17 not something that would justify termination.

18 MS. FORD: Well, I just needed to get one more thing
19 which is that to the extent that there was any development
20 activity that took place in the company, that happened in 2012 and
21 2013. So this is fairly old stuff.

22 THE COURT: But it's within the scope for the Request
23 for Production which goes back to August 29th of 2011.

24 MS. FORD: I'm sorry?

25 THE COURT: The Request for Production goes back to

1 August 29th of 2011.

2 MS. FORD: Yes, but the request itself was not served,
3 and we had no notice that Apple --

4 THE COURT: I see.

5 MS. FORD: -- considers this part of the case until I
6 believe it was June or July of 2019.

7 THE COURT: Okay. I take your point that you wouldn't
8 have necessarily known to search for this material until you
9 received the request. However -- however, having received the
10 request, --

11 MS. FORD: Uh-huh.

12 THE COURT: -- whenever it was served, your client had
13 an obligation to search for responsive documents. That obligation
14 doesn't fall on him personally, as you know. It's an obligation
15 that extends to counsel.

16 So I take that very seriously, and I am concerned about the
17 representations that have been made to the Court and that have
18 been made to Apple about documents responsive to this request.

19 I'd like to ask you one more question about that. I have
20 Exhibits B, C, and E that were submitted with the joint
21 submission, and I'm wondering -- it's been represented to me that
22 these were not produced by Mr. Kannan. They were discovered on
23 the mirror image of his laptop computer. So my question for you
24 is: Why were these documents not produced by Mr. Kannan? You've
25 now had an opportunity to investigate that.

1 MS. FORD: Well, the first answer is they would not have
2 been responsive documents, in our view. They would not be
3 responsive to the request that was asked.

4 THE COURT: Why not?

5 MS. FORD: Because the request that was asked is narrow.
6 It talks about "your development of applications with software."
7 He didn't develop. He didn't write code. And none of those
8 documents say that he did.

9 THE COURT: The request says, "All documents concerning,
10 reflecting, or relating to the development of ..."

11 MS. FORD: Right.

12 THE COURT: All right. It doesn't say "You were writing
13 a code."

14 MS. FORD: Yes.

15 THE COURT: Software development is a complex process
16 that I think we can all agree. It's not just coding.

17 MS. FORD: No.

18 THE COURT: So are you representing that you construed
19 this response as related only to actual coding?

20 MS. FORD: Yes.

21 THE COURT: That's an unreasonable interpretation of
22 this request.

23 MR. BOYER: Your Honor, if I might?

24 THE COURT: No. Not yet. So that's my question. If
25 you have more to say about my question about now having -- you say

1 you didn't think they were responsive. Did you encounter them and
2 choose not to produce them in your initial review?

3 MS. FORD: I did not review those documents and choose
4 not to produce them. But they would not have been, given what my
5 client and I discussed -- if you could -- if you could please just
6 hear me one more second. The issue of was what he had to do with
7 his wife's company, whatever it was, did that constitute app
8 development within the meaning of the company's policy, had he in
9 fact produced any of these documents, Apple would be using the
10 fact that he produced them as an admission on his part that he
11 violated their company policy by engaging in app development.

12 THE COURT: Yes.

13 MS. FORD: And, yes, with his firm belief and
14 understanding that the image prohibited is app development,
15 writing code and using your skills as a software code writer on
16 behalf of some other entity, and even that isn't even absolute,
17 but the --

18 THE COURT: And you might be absolutely right about
19 that.

20 MS. FORD: Uh-huh.

21 THE COURT: However, that's not a justification for not
22 producing the documents.

23 MS. FORD: Well, it's -- it is if producing them would
24 be construed as an admission that this constituted app development
25 because that's exactly what the question asked.

1 THE COURT: You could have phrased your response to make
2 clear your understanding, which is actually a requirement under
3 Rule 34, if you have a way of parsing this request, that you think
4 means that the documents that you are aware of fall outside the
5 scope of production -- you can also confer with Mr. Boyer about
6 it. But the Request for Production is not limited to coding.
7 It's broadly worded.

8 MS. FORD: Uh-huh.

9 THE COURT: "... concerning, reflecting, or relating to
10 your development of ..." That's not just coding. So maybe
11 reasonable people could quibble about that. Maybe not. The
12 merits are a totally different thing about whether it's a
13 violation of policy. You may be absolutely right that it is not
14 in violation of the policy. But I'm trying to deal with a
15 discovery dispute, and I'm rather concerned about what seems to me
16 to be an unfair parsing of this request.

17 So back to what we're going to do about it, I take it that
18 the current state of play, even now at this stage, is that no one
19 has searched Mr. Kannan's gmail account for documents that would
20 relate to the activity that is reflected, for example, in Exhibits
21 B, C, and E; is that correct?

22 MS. FORD: No. That's not correct. I haven't asked my
23 client to -- now that this issue arose, I asked my client to
24 search his gmail account and see if there were any emails in there
25 that would have related to anything having to do with his wife's

1 company, and he said that absolutely that they were not.

2 And he also testified in his deposition, because Mr. Boyer
3 asked him about it -- he said, "Did you have any email
4 communications?" And he said, "If I did, they would have been on
5 domains at this time, in '12 or '13, but don't exist anymore."

6 THE COURT: What does that mean?

7 MS. FORD: It means that they had -- his wife had a
8 domain, a web page, I guess, on the computer for her little
9 company. I think it was called Tringio. Anyway, it no longer
10 exists. And they used to communicate through that device, so
11 that's what he testified to at his deposition, was that if he had
12 any email communications back in '12 or '13, that they would
13 likely have been on this domain that no longer exists.

14 THE COURT: The email would have been on the domain, but
15 it was an email at --

16 MS. FORD: I'm not sure whether it was email or online
17 communication, but it may have been an email. But, anyway, if
18 there was any electronic communications there, it would have been
19 on this domain that no longer exists.

20 THE COURT: Okay.

21 MS. FORD: He testified to that at his deposition.

22 THE COURT: All right. But just to be clear, he has or
23 has not searched his gmail account?

24 MS. FORD: He has, and he did not find anything.

25 THE COURT: Okay. But you didn't conduct that search

1 with him?

2 MS. FORD: No.

3 THE COURT: Do you know what terms he used or how he
4 conducted the search?

5 MS. FORD: I asked him to look for the names of the
6 applications and for the company that (indiscernible) software.

7 By the way, one thing that has not come out here is that we
8 did produce other software -- another software agreement that his
9 wife had signed as part of the documents that we did produce. We
10 produced a number of things that had to do with his wife's use of
11 his laptop and we were aware of the software things that she
12 signed and (indiscernible).

13 But, in any event, yes, he said that he searched it and he
14 did not find anything in response to it. Now, if a third party
15 went in and searched it, one of the things that would happen is
16 that it would pop up emails between Mr. Kannan and myself, among
17 other things, because we communicated about it.

18 THE COURT: So the other thing that Mr. Boyer mentioned
19 is that there were -- there are other computers besides the Apple-
20 issued laptop that Mr. Kannan had. And I guess my question is how
21 many such other electronic devices, computers and other devices,
22 does he have?

23 MS. FORD: The only one that I know of is one that he
24 bought long after all of this was over, that he bought -- as a
25 matter of fact, that was acquired back in May when this whole

1 issue arose over whether he should be keeping personal information
2 on his Apple laptop.

3 THE COURT: May of 2019?

4 MS. FORD: Yes. So it's not going to happen again.

5 THE COURT: All right.

6 MS. FORD: (Indiscernible.) I know that he had
7 predecessor computers. If he still has some of them floating
8 around, I don't know, but I believe they were all Apple laptops
9 and so they probably went back to Apple when he switched
10 (indiscernible).

11 THE COURT: Are you speculating or do you know?

12 MS. FORD: I'm speculating. I didn't ask him that
13 specific question.

14 THE COURT: Was he asked in deposition what other
15 computers he had -- has or had?

16 MS. FORD: He was asked what other computers he
17 currently has as far as my recollection.

18 THE COURT: Okay.

19 MS. FORD: I don't believe he was asked historically
20 when he acquired the (indiscernible) at any given point in time.

21 THE COURT: All right. Mr. Boyer, is there something
22 you wanted to add?

23 MR. BOYER: Yes, Your Honor. So actually these
24 documents would have also been responsive to RFP 19 which this
25 Court did order him to produce in a limited fashion, and I'll read

1 the Court's order.

2 THE COURT: You're referring to B, C, and E -- the
3 Exhibits B, C, and E to the joint submission?

4 MR. BOYER: Correct, Your Honor.

5 THE COURT: Uh-huh.

6 MR. BOYER: And the Court's order said, "Produce
7 responsive documents reflecting software applications developed by
8 any person using Mr. Kannan's Apple-issued computer equipment,
9 whether those responsive documents are currently stored on Mr.
10 Kannan's Apple-issued computer equipment or elsewhere."

11 So even if it was his wife's development, it was on his
12 computer and it was required to be produced regardless.

13 THE COURT: Uh-huh.

14 MS. FORD: Your Honor, --

15 THE COURT: All right. Just a moment. I'm going to let
16 you respond as well. With respect to the other computers -- so
17 Ms. Ford has just represented that the only other computers -- the
18 only other computers that he has currently are a computer that he
19 purchased in May of 2019 that he's using only for personal stuff,
20 not Apple stuff.

21 Do you have any contrary information?

22 MR. BOYER: That would be surprising because I did ask
23 him about that during his deposition and he said he couldn't
24 recall when he purchased it. And I would think that if he
25 purchased it just a few months ago, he would recall that.

1 THE COURT: Do you have any -- any evidence about these
2 predecessor computers that you obtained during the deposition?

3 MR. BOYER: I don't believe he mentioned other than we
4 know specifically that he had Apple computers, that when he
5 changed jobs he would recycle those. I don't know about any other
6 personal ones because I did ask him about that during his
7 deposition and he said there was this other one, but he couldn't
8 recall when he purchased it.

9 THE COURT: Okay. And as to the prior Apple computers,
10 does Apple have -- have those computers, or have mirror images of
11 those computers?

12 MR. BOYER: We do not.

13 THE COURT: So the one that you have a mirror image of
14 is the most recent Apple-issued laptop?

15 MR. BOYER: Yes.

16 THE COURT: Okay. And could you remind me when the
17 mirror image was taken.

18 MR. BOYER: It would have been in April of 2019.

19 THE COURT: Okay. All right. Ms. Ford, you wanted to
20 respond.

21 MS. FORD: Yeah, on a couple of -- on a couple of
22 issues. One is that when my client was asked to produce documents
23 that related to the use of his computer by (indiscernible), we
24 produced a bunch of (indiscernible), which included other things,
25 some contacts and stuff that were -- his wife's contracts and we

1 produced those (indiscernible) at that time.

2 And then another thing that we were asked to do was send in
3 a list of files -- send a list of the files, which we did on 4/25.

4 He also -- and the Court didn't even ask us to do this -- he
5 uploaded 16 gigabytes of copies of files from his laptop, the one
6 that his wife had saved and shared on his computer, and he did
7 that on October 26th. He uploaded those to Dropbox and sent them
8 in to Apple. So they have copies of everything that related to
9 his wife's company that was on that laptop. He has produced and
10 I don't know why Apple keeps saying over and over that he never
11 produced the things that reflected his wife's file sharing use of
12 his computer.

13 He also testified about this at great length in his
14 deposition (indiscernible).

15 THE COURT: I think the principal concern at this point
16 is Mr. Kannan's gmail.

17 MS. FORD: Yes.

18 THE COURT: So I don't think there's been the kind of
19 search of his gmail, at least not timely, that Mr. Boyer said he
20 expected to be done. So I don't think the production that you're
21 referring to had anything to do with gmail, if I'm not mistaken,
22 this voluminous production in the file.

23 MS. FORD: No, because what we were asked to produce was
24 documents related to someone else using his computer, and the use
25 of his computer was for saving files on it, so he just kept all

1 the files which he had saved and we uploaded them to Apple. And
2 they already had them from the mirror, so they already had them,
3 but we did it -- we did that.

4 MR. BOYER: And I would say for the record, Your Honor,
5 I have all that here.

6 THE COURT: You have what all right here?

7 MR. BOYER: The files that have been produced, and these
8 documents that we specifically pointed out to the Court are not in
9 there.

10 THE COURT: Uh-huh. All right. I want to turn to the
11 other issue that's raised, albeit it in an abbreviated fashion in
12 the joint submission. That's Docket 184, and that's this issue
13 about Mr. Kannan and his family's time in India.

14 And I think principally the dispute is about responsive
15 information for Request 16, "Periods of time your spouse and son
16 were in India." I think you already explained to me why you think
17 this information is relevant to a claim or defense.

18 But what I -- what I'm wondering is you again say that Apple
19 found documents showing Mr. Kannan's wife was in India -- you say
20 "until April of 2015." I'm not sure I quite understand what that
21 means because you explained here that Mr. Kannan's wife and son
22 were in India during the school year but not in the summers on all
23 of the years that are relevant to this dispute.

24 So I'm not entirely sure -- not entirely sure what
25 information you still need if you've got that documentation

1 already.

2 MR. BOYER: Yes, Your Honor. So it's -- I'm not sure
3 that there's anything else out there at this point, but the
4 problem is I don't have any confidence that there isn't. And we
5 produced a document I believe at the end of October that we found
6 on his computer showing an email that he had sent to a school
7 district saying, My son will be essentially in India for the
8 school year, for the 2014-2015 school year. That was not a
9 document that was produced. It was a gmail. It was on his --
10 saved on his laptop but also should have been in his email account
11 and was not produced. So it gives me no confidence that these
12 searches are done inappropriately.

13 And one other document that I didn't raise, but again goes to
14 the veracity of the searches that are being done, is that we
15 received employment records from Adobe that we subpoenaed that he
16 had brought over, and that we had never received any emails from
17 Plaintiff confirming that he had applied there or any response.
18 But we got them from Adobe. And after we got them from Adobe, we
19 got them Plaintiff.

20 THE COURT: Have you asked an interrogatory about -- for
21 the information about what periods of time Mr. Kannan's wife and
22 son were in India?

23 MR. BOYER: I did not, but I did ask him in his
24 deposition and I confirmed the times now.

25 THE COURT: All right. So he testified consistent with

1 the documentation that you have?

2 MR. BOYER: Yes, Your Honor.

3 THE COURT: Okay. And have you also asked an
4 interrogatory about the question of, "Which companies did you
5 apply to and at what times?"

6 MR. BOYER: We did ask -- we sent a Request for
7 Production for that.

8 THE COURT: Have you asked an interrogatory?

9 MR. BOYER: We have not, Your Honor.

10 THE COURT: Okay. All right. It seems to me that you
11 have the information that you need. I'm not sure it's really
12 proportional to the needs of the case for me to order anything
13 further on this point. It sounds like you've got your documents,
14 you've got your deposition testimony. They're both consistent.

15 Explain to me why requiring a third party to search for
16 emails about the time that Mr. Kannan's family was in India is
17 really useful at this point.

18 MR. BOYER: Well, I mean, the only -- the only thing
19 that would be useful would be the specific dates and so we could
20 have a specific timeline. Of course, his memory is not perfect.
21 I don't think anyone's would be with regard to specific dates when
22 somebody was here, when they came back. The document obviously
23 show when the family was gone and when they were back because the
24 airline tickets would show when somebody left and when somebody
25 came back.

1 THE COURT: And you have those documents now.

2 MR. BOYER: I have some airline tickets. I can't piece
3 together everything. And I'm not sure if there is anything else
4 out there. But I am not -- I am confident that it was -- the
5 search was not done properly because I produced the documents.

6 THE COURT: All right. Ms. Ford, with respect to the
7 question of the precise periods of time that Mr. Kannan's wife and
8 son -- I'm assuming his son is not in India by himself, so that's
9 why I use the term "wife and son" -- were in India, does your
10 client have information specific to what those times were?

11 MS. FORD: First of all, Mr. Boyer is overstating what
12 the testimony on the documents show because my client reported to
13 Mr. Kotni in 2013 through part of 2017, and the time he's talking
14 about was likely '15 and '16. So it doesn't cover the entire time
15 he worked for Mr. Kotni.

16 THE COURT: Fine.

17 MS. FORD: We have produced documents and he has
18 testified about it and he was fairly specific about the dates and
19 the why, the reasons and -- that would justify --

20 THE COURT: Let me just be a little bit more specific.
21 If Mr. Kannan had an opportunity to sit and reflect -- not in a
22 deposition, but to figure out precisely when his wife and son were
23 in India, using whatever sources of material he has to do that,
24 whether it's his own recollection or whatever -- can he give
25 precise dates?

1 MS. FORD: Probably not precise dates except for the
2 ones that are shown by the airline tickets and itineraries that we
3 have, but pretty close, within a month or so. And that's what he
4 testified to in his deposition. They (indiscernible) were
5 planning to go in November. They went in November and they came
6 back in January. When he talks about the school year, the
7 academics (indiscernible) what the evidence shows, but, yeah, he
8 can say roughly when they went and when they came back with some
9 precision to the extent that we still have the airline tickets.

10 But this was another one Mr. Kannan couldn't have known back
11 in the day, 2014, '15, '16, or just whatever would be relevant to
12 anything or even during the pendency of this case.

13 THE COURT: Are you telling me that he wouldn't have
14 thought it would be relevant to his claims that there were periods
15 of time when his wife and son were not even there that could
16 justify, you know, any kind of need for a flexible schedule? That
17 sounds -- strikes me as a little bit --

18 MS. FORD: Well, --

19 THE COURT: -- suspect.

20 MS. FORD: That's because Mr. Boyer has really misstated
21 the claim.

22 THE COURT: Okay. So you're not claiming that he
23 required a flexible schedule and was denied that by Mr. Kotni?

24 MS. FORD: We claim that he requested a flexible
25 schedule in 2013 when he first joined Mr. Kotni's team. In 2013

1 and 2014 and to a certain extent thereafter, he did use that
2 flexible schedule to care for his son. We do not claim that Mr.
3 Kotni ever forbid him from doing that. As a matter of fact, he was
4 able to do that quite nicely because he keeps very irregular hours
5 anyway because a lot of the people that Mr. Kannan supervised
6 worked in other parts of the world.

7 THE COURT: Uh-huh.

8 MS. FORD: Some in India, some from Asia, people all
9 over the world. So he often has to work in the middle of the
10 night but then has some time off during the day, and they all have
11 very irregular schedules that work in that (indiscernible) for
12 that reason.

13 So, no, we're not claiming at all that he was forbidden from
14 taking the time he needed. We say that he was retaliated against
15 because his son has autism and because of the requests that he
16 made for -- that he be allowed that flexibility.

17 THE COURT: Sounds relevant.

18 MS. FORD: So we're claiming retaliation, not that he
19 was prevented from doing it. And, you know, were there times when
20 he required less time to be caring for his son as his employment
21 rolled forward? Absolutely that's probably true.

22 THE COURT: Uh-huh.

23 MS. FORD: But that doesn't change the fact of the
24 retaliatory and discriminatory intent that we maintain was that
25 Mr. Kotni just didn't want to have someone (indiscernible) that

1 had an autistic child and (indiscernible).

2 THE COURT: Uh-huh.

3 MS. FORD: By the way, Mr. Boyer says that our complaint
4 is all about that there were complaints that Mr. Kannan was not
5 responsive. That's not in our complaint anywhere. Mr. Kannan was
6 asked by Mr. Boyer in his first deposition, "Did Mr. Kotni ever
7 say anything to you that indicated directly that he didn't want
8 you to take time to care for your son?" And he said something to
9 the effect that, "The closest thing would be that he complained
10 once or twice about response time." That was the only thing.

11 THE COURT: Okay. So what I'm toying with here is --

12 MS. FORD: So the claims are slightly different.

13 THE COURT: I understand, and you have a different view
14 of what's relevant and what's not relevant to your claims. And of
15 course Mr. Boyer has a whole defense on behalf of Apple that he
16 plans to put on. And I'm not going to resolve who gets to put on
17 what evidence or how it's going to turn out.

18 But what I -- what I am concerned with is the discovery
19 request, which was not objected to in any way by the time we got
20 to the hearing and seems to have an incomplete response.

21 Now, I don't think that a request for production of documents
22 is necessarily the most effective tool here in the first place,
23 but it seems that there -- there was documentation that sort of
24 trickled out later that then got asked about in deposition and the
25 answer is probably fine but maybe not as precise as it could be.

1 So what I'm toying with -- and I want to get your responses
2 for this -- is I am playing with giving Apple leave to serve a
3 specific interrogatory or maybe I will just craft a specific
4 interrogatory about this issue that Mr. Kannan will be required to
5 answer. This is not new discovery. This is a remedy for a
6 failure to produce complete documents.

7 So I'd like to hear Ms. Ford's response to that -- that
8 proposed resolution of this issue.

9 MS. FORD: Well, if that is a resolution which can avoid
10 further deposition questioning or something really cumbersome
11 while they sort of have a person searching for I don't know what,
12 then I would say that it's probably something that is not terribly
13 burdensome to do.

14 On the other hand, I'm not hearing any limits whatsoever on
15 Apple's side on the scope of further discovery that they're going
16 to do in this case.

17 THE COURT: I'm going to just nip this in the bud.
18 There is no more discovery. We are done. I already issued an
19 order on it about what's allowed to be done in this case. Motions
20 to compel to enforce the prior discovery order, okay. No new
21 discovery. So I'm not -- I will get to your -- the pile of
22 additional motions that were filed. But right now, I'm really
23 just trying to focus on the discovery dispute that was briefed in
24 a timely way and is before me right now which is 184.

25 Mr. Boyer, your views on the proposed remedy?

1 MR. BOYER: I think that's fine, Your Honor. And just
2 for the record, I do want to state from the complaint, this is
3 paragraph 60, "Mr. Kotni evaluated Plaintiff's performance lower
4 than was appropriate and denied him RSU awards, increases in job
5 level, bonuses, and compensation increases based on the fact that
6 Plaintiff had asked for a flexible schedule and sometimes worked
7 a flexible schedule and Kotni's perception that Plaintiff was
8 spending time taking care of his son's needs rather than working
9 and/or that he would be inattentive at work due to his son's
10 disability."

11 So it's right on point in defense of that claim.

12 THE COURT: All right. I will consider -- I will
13 consider requiring an interrogatory to be answered.

14 I do not have all I need on this issue, and let me tell you
15 what my thoughts are about a resolution on both.

16 So starting -- going back to the Request for Production 18,
17 I am not sympathetic to Mr. Kannan's excuses that because he's in
18 India, it makes working with U.S. counsel difficult. That may be
19 a fact, but he is the Plaintiff in this matter and he has certain
20 obligations in prosecuting his case. And among those obligations
21 are complying with discovery and discovery orders.

22 So I am also not sympathetic, Ms. Ford, to your explanation
23 that you don't have the technical tools or ability to do the kind
24 of searches that would be necessary. That is no longer the
25 standard for dealing with discovery of electronically-stored

1 information in this day and age. You just can't rely on counsel's
2 inability or lack of resources or lack of, you know, technical
3 resources.

4 Both parties failed to comply with Rule 26 with respect to a
5 discovery plan for electronically-stored information. Given that
6 there was electronically-stored information that was relevant in
7 this case, Rule 26 requires you to discuss and confer about a
8 plan, and nobody did that. So now here we are after the close of
9 discovery with this problem.

10 I consider Mr. Kannan's declaration at Docket 160 to be, at
11 best, misleading and, at worst, a misrepresentation to the Court.
12 And that declaration and the failure to do an adequate search for
13 documents responsive to Request for Production 18 I do think
14 violates my order.

15 As a remedy, what I plan to do is to order Ms. Ford to
16 personally review the gmail that Mr. Kannan has and that will be
17 based on a prior conference with counsel for Apple about the
18 search terms to be used. And you're not just reviewing the gmail.
19 You're also reviewing the attachments to any email. And you are
20 looking for Mr. Kannan's work relating to any software that is not
21 for his employer Apple.

22 So, Mr. Boyer, I'm going to require you to provide search
23 terms within seven days. You can provide them earlier. And
24 within seven days of provision of search terms, I'm going to
25 require the search to be done, this review to be done by Ms. Ford.

1 You cannot delegate this to your client Mr. Kannan. If you want
2 to use a third party vendor, you are welcome to do that and you
3 can review the results. But I'm going to require that to happen.

4 I don't think using a third party vendor -- I'm not going to
5 require that because I think it's overkill. I think it's not
6 proportional to the needs of the case. You already have
7 substantial information that you've obtained from review of the
8 material on the mirror image of Mr. Kannan's laptop. I don't
9 think the gmail was reviewed appropriately, and so I'm going to
10 order that to be done. But I will leave it to Ms. Ford whether
11 she does it personally or uses the services of a third party
12 vendor to assist her in doing that. I will allow you to propose
13 search terms.

14 Don't be greedy. If we get search terms that hit like every
15 single email, that will not be acceptable. So that's the
16 resolution that I propose, and I will consider on the other issue
17 the interrogatory that I suggested as a way to resolve that
18 dispute as well.

19 I'm prepared to move on to the next discovery dispute unless
20 the parties have any -- and I will issue a written order. You
21 won't have to just take notes or order the transcript. I will
22 issue a written order on these issues. But before I move on to
23 the next dispute, are there any questions about what I've just
24 described as my proposed -- or my expected resolution?

25 MS. FORD: My only question would be what if we are

1 provided with search terms and we disagree with or dispute --

2 THE COURT: All right. I've told them not to be greedy.
3 Don't be too picky. I mean, this is the third time that I've had
4 to address this issue of this Request for Production, so I'm just
5 going to say I expect the parties to be reasonable about this.

6 If the search terms result in, you know, outrageous number of
7 hits, that's going to be a problem. So I'm not going to pre-judge
8 that issue. If you have to come back to me, you can. But as you
9 can tell, I'm rather aggravated about the way the discovery has
10 been conducted in this case and the way the parties have conducted
11 themselves.

12 I looked back at my notes from our first meeting where I gave
13 you all the lecture about how you're supposed to cooperate in
14 discovery. Clearly hasn't happened and there's enough blame to go
15 around -- to go around -- all around here, but I really encourage
16 you, Ms. Ford, to be cooperative in this process because I am not
17 awarding Apple the relief that it seeks and I'm giving you an
18 opportunity to make sure that your client's production in response
19 to this Request for Production is in fact complete. So I think
20 you should approach it in that spirit.

21 MS. FORD: I was asking you a more procedural question
22 of how we would try to resolve it or call it to the attention of
23 the Court because --

24 THE COURT: Send me a short, short note saying the
25 parties need the Court's assistance. I don't want briefing. I

1 don't want people telling me what the other guy did badly. Just
2 say, "We think we need a call with the Court." I will set you up
3 for a telephonic call and we will do it as soon as I can. But I
4 would encourage you to not have to do that.

5 Okay. Docket Number 198, this is the AEO designations. All
6 right. So Mr. Kannan seeks relief in the form of I think de-
7 designation. Let me just say I am not going to entertain re-
8 litigation of the parties I've already ruled on in Docket Number
9 105.

10 It's very difficult for me to understand from the submissions
11 that I have what the problem is. For example, at the bottom of
12 page 2 of Mr. Kannan's half of the joint submission, there's a
13 description about what is -- what remedy is being sought with
14 respect to this Exhibit B.

15 I look at Exhibit B. It has no confidentiality designations,
16 and I can't tell if Mr. Kannan is complaining about AEO
17 designations, redactions, or both. Same thing at the top of page
18 3, Exhibit C. I can't tell what portion is or is not designated
19 AEO.

20 And then Mr. Kannan writes that Apple has designated all
21 pages AEO of some documents when only certain pages should be.

22 Exhibit D is the example. That shows the opposite. It shows
23 that there are AEO designations only on certain pages.

24 And I have Exhibit E, again, a job application example. Has
25 redactions and no AEO designations.

1 So I get this submission and I can't tell what the basis is
2 for the complaint. So I am very reluctant to grant any -- I don't
3 see how I can grant any relief when I have that kind of a showing.

4 So, Ms. Ford, you've heard my concern. I'm going to give you
5 an opportunity to explain what the problem is and how you want --
6 how you are not arguing for a re-visitation of my prior order.

7 MS. FORD: I'm not sure, first of all, why what you just
8 described -- you began talking about Exhibit B as in "Boy."

9 THE COURT: The -- yes, the first example that I'm
10 looking at is Exhibit B. It's at Docket 199 -- this is the sealed
11 version -- and it has a bunch of redactions in it. It has no AEO
12 designations on it.

13 MS. FORD: May I just explain something, Your Honor?

14 THE COURT: Sure.

15 MS. FORD: The way that Apple attached its Bates numbers
16 and AEO designations is something that sometimes when you print it
17 out on certain computers, those don't carry over and they don't
18 get printed.

19 May I bring it to you to the bench and show you a copy of
20 Exhibit B?

21 THE COURT: Are you just going to tell me that it has
22 AEO designations on it?

23 MS. FORD: Yes, and that got filed with the court. This
24 is just a printout of what I filed with the court.

25 THE COURT: Okay. So I'm looking at --

1 MS. FORD: What you're looking at doesn't show that on
2 there.

3 THE COURT: No, it doesn't. It does not.

4 MS. FORD: Because of a technical problem that I don't
5 understand.

6 THE COURT: All right. Okay. So let's assume that
7 every single page has an AEO designation in Exhibit B, and I'll
8 approach it that way. Is there a problem that there are AEO
9 designations and redactions in the same document? Or are some
10 versions AEO and then other versions "Confidential With
11 Redactions"?

12 MS. FORD: First of all, all the pages that we have
13 presented to you as exhibits are all marked "Attorney's Eyes
14 Only," okay? The redactions that you see there -- for example, on
15 Exhibit B, you see these redactions?

16 THE COURT: Yes.

17 MS. FORD: Those are mostly just email addresses.
18 That's not what the problem is.

19 THE COURT: Okay.

20 MS. FORD: That's not what the concern is at all. But
21 on Exhibit B, what they did was they -- the first three pages the
22 first time they produced it was with AEO and it has people's names
23 on the second page.

24 THE COURT: Uh-huh.

25 MS. FORD: Okay. This is a listing. And then they put

1 it down to "Confidential." But when they put it down to
2 "Confidential," then they redacted all of those names.

3 THE COURT: I see. So this would be at page 8 of 185 in
4 Document 199-2, which is the sealed --

5 MS. FORD: That's what I was trying to illustrate for
6 you there. So it's the fact -- just the fact that there are
7 redactions of people's phone numbers and emails is absolutely no
8 problem for us.

9 THE COURT: All right. So that was extremely confusing
10 when you're describing redactions and AEO in a two-line argument
11 about this category.

12 MS. FORD: It was really hard for me to pare all those
13 down so we could show -- yes, but that is one technique that they
14 used.

15 Another thing that we have here is that some of these emails
16 go on for many pages and particularly the ones with all those
17 compensation planning emails.

18 THE COURT: Yeah.

19 MS. FORD: And I think there are several examples and
20 (indiscernible). But they will have five or six pages of detailed
21 description of what the guidelines and rules are for granting
22 compensation and bonuses and RSUs and other things. No mention of
23 any specific employee information. Then at the end, they will
24 have attached a spreadsheet that has individual employee names and
25 what they individually are going to receive.

1 And what Apple did was to mark all of the entire document,
2 including all of the guidelines and rules for controlling how
3 compensation was to be computed. And they made that "All
4 Attorney's Eyes Only," and that is really crippling because Apple
5 has a number of witnesses who can testify about these things. I
6 have one and it's the Plaintiff. And if it's going to be him
7 trying to compare his compensation to others and the reasons why,
8 he needs to have access to that information. There's actually
9 nobody else on our side who can testify to that.

10 THE COURT: All right. Two things. Two things. I've
11 already ruled that Mr. Kannan cannot see confidential employee-
12 specific information. So are you arguing about that again?

13 MS. FORD: I am -- not with respect to what I just said.
14 The pages of the -- that show just the guidelines are not
15 employee-specific.

16 THE COURT: Right.

17 MS. FORD: I believe that the Court should, in light of
18 the things that we discovered in deposition after your prior
19 ruling, which is that Mr. Kotni, in explaining why other people
20 got paid a lot more, they were paid three, four times as much as
21 Mr. Kannan, he relies exclusively on those performance reviews.
22 There's nothing negative in there. We're not looking for
23 complaints or dirt on any of these other people. To the contrary,
24 we're looking for the reasons that Apple relies on for paying them
25 a lot more money.

1 And when I asked Mr. Kotni those questions in his deposition,
2 he simply started to read the performance reviews and he testified
3 that he really wouldn't be able to remember why he gave them more
4 money than he gave him without looking at the performance
5 tabulations. And yet I don't have any witness other than Mr.
6 Kannan who can say, "Well, he accomplished that, but I
7 accomplished this over here."

8 THE COURT: Well, of course you do. Mr. Kannan can
9 testify to all of his accomplishments. You have access to both
10 and you're --

11 MS. FORD: The comparison between himself and --

12 THE COURT: I'm not going to tell you how to litigate
13 your case, but I don't think that's a justification for getting
14 access for your client to someone else's performance reviews. And
15 I've already ruled on that issue.

16 So the fact that Mr. Kotni testified about that in deposition
17 doesn't change my mind on that issue, so I don't want to re-
18 litigate and I won't permit you to re-litigate that issue.

19 It may very well be that when you all get to trial, your
20 presiding judge will make entirely different calls on what gets to
21 be testified to in public, what documents are shown in public. I
22 mean, he's not going to be clearing the courtroom every single
23 time a witness is going to talk about another employee. So that
24 would be a very impractical way to conduct a trial.

25 But for discovery purposes, I've already issued a decision on

1 that and I don't want to -- I don't want to revisit that and spend
2 time revisiting that.

3 I am concerned with over-designation. I am concerned about
4 that issue. So, Ms. Ford, I would like for you to focus on what
5 you view as the over-designation beyond what I have already
6 ordered can be designated AEO. So I hear you when you say there
7 are portions of documents that have been designated AEO in their
8 entirety and only some portions of those ought to be treated AEO.
9 I got that point. That's one I have in my list to ask Mr. Boyer.

10 Are there other examples of the kinds of things?

11 MS. FORD: Exhibit C, which is the documents that have
12 to do with the internal investigation by Mr. Kannan's complaint
13 that he wasn't being treated fairly compared to other people,
14 okay? And Apple produced some notes concerning the interviews
15 that were done.

16 Now, initially Apple designated all of those notes in their
17 entirety, even the questioning of his manager, as being
18 "Attorney's Eyes Only."

19 Then in response to us raising the issue, they sent us
20 another copy which was then marked "Confidential," which is fine
21 if it says "Confidential," but what it did was it redacted -- when
22 Mr. Kotni gave testimony to the investigator and when the
23 investigator wrote his report, he said, Mr. Kannan was paid fairly
24 and I can tell that because here's these two other named employees
25 who got paid similarly to him.

1 The thing is those people are not comparable employees. But
2 if my client can't know who those people are or what -- what that
3 -- and Apple has redacted all of that information from the
4 investigative report that relates to the investigation of Mr.
5 Kannan's claim and, again, he needs to be the one to testify about
6 that. It's a denial of due process if he can't testify about
7 these comparisons to Apple's --

8 THE COURT: Why can't you ask him, "Who are the
9 employees who are comparable to you and who are the employees who
10 are not?" Why can't you just ask him those questions? I've
11 already ruled precisely on how you may advise your client, gather
12 information from your client, get help from your client in
13 analyzing the documents that you have. These problems that you're
14 describing are problems I have already heard and taken into
15 consideration in ruling on the prior motion.

16 So if there's something else.

17 MS. FORD: I think that the notes of that investigation
18 are entirely a different issue than the performance reviews of the
19 people. I really do. I think what Mr. Kotni testified to the
20 internal investigator to justify his decision-making is something
21 that doesn't belong in the AEO category, even though it does
22 mention other people's names.

23 THE COURT: All right. Is there anything else?

24 MS. FORD: That's it.

25 THE COURT: All right. I'm going to ask Mr. Boyer some

1 questions.

2 MR. BOYER: Yes, Your Honor.

3 THE COURT: The main thing that struck me about your
4 response here was the designation as AEO of the compensation
5 guidelines. Your argument is that these are confidential to Apple
6 and highly sensitive. I take that point. You can designate them
7 "Confidential." And I think it's entirely appropriate when you
8 have documents that can be easily segregated. If you've got a
9 chart at the end that has employee-specific information that gets
10 AEO treatment, the rest of it doesn't need to. You can designate
11 that "Confidential."

12 So I'm going to order that you do that and make those
13 changes.

14 What I have some concern about -- and maybe this is a
15 question that I can ask -- I'll pose to both counsel -- is what is
16 the volume of documents where the document is designated AEO and
17 the reason is is because strewn throughout that document in
18 different places are references to other employees' names and
19 compensation or personnel information, performance reviews? Are
20 we talking about thousands of documents like that, 50 documents
21 like that? What is the universe?

22 Let me ask Mr. Boyer since you did -- you did the AEO
23 designations in the first place.

24 MR. BOYER: I would think it's significant. However --
25 well, I take that back. If it's just the performance -- I think

1 anything related to specific employees, we've already covered and
2 it doesn't sound like the Court's going to want to see some
3 (indiscernible) designation. That looks like a big chunk of the
4 documents are kind of off the table.

5 With regard to the comp guidelines, if we need to re-
6 designate those, but keep the charts confidential, it's a few
7 hundred.

8 THE COURT: That's not what I'm asking about.

9 MR. BOYER: Okay.

10 THE COURT: So, here, let me give you an example. So
11 let's take Exhibit B, which is the example I was discussing with
12 Ms. Ford and it was the third page of Exhibit B. It doesn't have
13 any Bates numbers, so I don't know what it's actually called. It
14 probably does have Bates numbers but not my copy. But this is
15 page 8 of 185 in Docket 199-2, the sealed version, where there's
16 a list of four employee names.

17 So what Ms. Ford said is that a copy of this document was
18 produced. It was de-designated down to "Confidential." But those
19 four names were redacted so that Mr. Kannan could see them. The
20 rest of the document doesn't need to be designated AEO is what I
21 -- at least the preceding pages.

22 So what I'm asking is how many documents in the production
23 that's marked AEO are like this, where but for a few names or a
24 few names associated with salary information or performance review
25 information, the remainder of the document could be shared? Same

1 thing for this internal investigation summary, which I understand
2 has received the same treatment. There have been redactions so
3 that Mr. Kannan could see it. The redaction is specific to the
4 employee information, but most of the document doesn't need to be
5 designated AEO.

6 How big is that problem?

7 MR. BOYER: I don't think that's the majority of it. I
8 would say maybe there's 50 documents like that.

9 THE COURT: All right. Ms. Ford, do you agree there are
10 about 50 documents that fall into that category?

11 MS. FORD: I would think there's more. I would think
12 it's probably between 50 and a hundred at least that fall into
13 that category.

14 THE COURT: Okay. Because here's what I'm prepared to
15 do. I think that it's appropriate -- for documents that are
16 meaningful to the case -- you know, you don't want to waste your
17 time on things you don't want to waste your time on, but ones that
18 are meaningful to the case, I think it's appropriate to do the
19 redaction treatment of them so that Mr. Kannan can see everything
20 else and those can be designated "Confidential With Redactions."
21 Ms. Ford, of course, can see everything. So that requires there
22 to be two versions of such documents -- the AEO version and a
23 "Confidential With Redactions" version. And maybe it does not
24 even need to be "Confidential." I'm not proposing they have to be
25 "Confidential" -- but it sounds like that might be the mode -- so

1 that Mr. Kannan can see everything he's entitled to and there
2 aren't these few bits and pieces of the document holding up his
3 access to the remainder.

4 MR. BOYER: We've actually done that with quite a few of
5 these.

6 THE COURT: Okay.

7 MR. BOYER: I can give you examples of that.

8 THE COURT: Yeah, so that's why I wanted to understand
9 the scope of the problem 'cause I think that's -- that would be --
10 that would be important. If Ms. Ford can provide you a list or --
11 I don't know how you want to do it -- maybe you guys have already
12 provided a list, but whatever it is that you want to see, you can
13 share that with Mr. Boyer. And if it really is just 50 to a
14 hundred, maybe it's just easier to do them all.

15 So whatever -- I want to try the easiest path here, but I
16 think that that would be an appropriate thing to do. How long do
17 you think that you would need, assuming there are, say, a hundred
18 documents? How long do you think you'd need to --

19 MR. BOYER: Once they -- you know, if it's a hundred
20 documents, five days.

21 THE COURT: Let's say there's no list given. It's just
22 whatever documents there are. They estimate that there's a
23 hundred.

24 MR. BOYER: Well, if we're going to have to go through
25 and look through them and make that determination, at least a

1 week.

2 THE COURT: I don't want to micro-manage this. I want
3 you all to figure out how many documents there are that you need,
4 Ms. Ford. If you want them all done because there's a -- there's
5 a hundred or less, fine. If there's way more than a hundred,
6 you're going to have to tell Mr. Boyer which ones you want done
7 because that would be unreasonable.

8 So that's kind of the dividing line there.

9 MS. FORD: I'm sorry. I'm not following you.

10 THE COURT: I'm prepared to order him to do the
11 redaction and confidentiality designation for all the documents
12 that I described where there's employee-specific information
13 embedded in an AEO document that otherwise Mr. Kannan could see
14 but for that employee-specific information. If there are a
15 hundred such documents, I'll just order him to do them all. If
16 there are more than a hundred documents, I'm going to require you
17 to provide a list of the ones that you really want your client to
18 have access to with the redactions.

19 So I suggest you confer about that.

20 That's separate from the question of -- with respect to the
21 compensation guidelines, I'm going to order that those be done
22 without any kind of listing. The compensation guidelines that are
23 not employee-specific, results of compensation process, that
24 portion of the document has to be de-designated.

25 MR. BOYER: Okay, Your Honor.

1 THE COURT: That's important to disclose. I'm trying to
2 figure out if there are any other categories of documents I can
3 deal with in a categorical fashion, but I couldn't tell from this
4 submission if there were. And I realize, Mr. Boyer, I haven't
5 really given you an opportunity to respond to what Ms. Ford said,
6 but -- except with respect to the compensation issue.

7 Is there anything that you'd like to add?

8 MR. BOYER: Counsel will go ahead and re-designate the
9 compensation documents --

10 THE COURT: Yeah.

11 MR. BOYER: -- according to the Court's order today?
12 That's not a problem, Your Honor.

13 The only thing I would note is that we've done this
14 "Attorney's Eyes Only" to redacted to confidential with at least
15 -- looking at -- it's about 200 pages' worth of documents. So
16 with these departments, I don't really know other than the comp
17 guidelines once those get re-designated what's left.

18 THE COURT: You don't know how many remain.

19 MR. BOYER: Yes.

20 THE COURT: Okay. All right. Well, that's a point that
21 you should confer about.

22 MR. BOYER: All right.

23 THE COURT: I will again give you a written order on
24 this question. And, you know, I would encourage you if there are
25 specific documents for which there can -- you know, there is some

1 request, that you confer about it. Again, if it's something
2 that's really meaningful, Ms. Ford really needs, see if you can
3 accommodate it given the concerns and the prior order that I've
4 already issued on this point.

5 All right. I think -- I think that that's -- that's all I
6 had for 198. I will issue a written order.

7 So let me address some of the other things that remain. I'm
8 not taking argument on this, but I'm going to share with you how
9 I intend to handle these remaining matters.

10 I am going to decide Mr. Kannan's multiple motions for leave
11 and for protective orders and for reconsideration of my prior
12 orders as follows:

13 Docket No. 186, which was filed on November 11th, that's an
14 administrative motion asking for leave to file a motion for a
15 protective order barring Apple from making discovery demands after
16 the close of discovery and generally complaining about Apple's
17 discovery conduct, I have already issued an order, as I reminded
18 you all at the outset of this hearing, about how the deadline for
19 fact discovery works, how the motion to compel deadline works, and
20 about what motions the Court will entertain going forward. That's
21 Docket No. 190. In all other respects, I am denying this
22 administrative motion.

23 For Docket No. 187, filed on November 11th, this is mostly an
24 improper request for reconsideration of my prior order regarding
25 the employee designations "high growth" and "key talent." And

1 there's no basis for seeking reconsideration recited in that
2 request.

3 I do, however, have one question for Apple. Are the records
4 in the Merlin system records that would show which of Mr. Kotni's
5 employees were designated "high growth" or "key talent"?

6 MR. BOYER: I asked my client and we believe, yes, there
7 would be information on that.

8 THE COURT: Have you produced those records?

9 MR. BOYER: We have produced them on the spreadsheets.
10 But that designation is contained on the spreadsheets that we
11 submitted in our opposition. It was submitted today with the
12 motion for every year.

13 THE COURT: Okay. Have you produced those records
14 before Mr. Kotni's deposition or only after the fact?

15 MR. BOYER: Those were all produced before.

16 THE COURT: Okay. So let me just make sure I understand
17 because I know there's reference to calibration sheets, but what
18 I'm asking about is the records in the Merlin system that Mr.
19 Kotni referred to in his deposition, have those records that would
20 reflect which of his employees got "high growth" and "key talent"
21 designations for the relevant years, have those records been
22 produced?

23 MR. BOYER: Not from the Merlin system. No, Your Honor.

24 THE COURT: Okay. I'm going to order you to do that --
25 create a database, produce those records. Give those to Ms. Ford

1 and that's it. No more deposition. No more anything about it.
2 Just produce those records. Okay?

3 All right. Docket No. 196, filed on November 16th, I view as
4 just more argument about the matters raised in Docket Number 184,
5 186, and 187. I view it as an effort to circumvent my discovery
6 dispute resolution process and my standing order, and that is
7 denied as well.

8 There are a number of pending administrative motions to seal.
9 Some of them involve motions to seal by one party because the
10 other party has designated material confidential and that's mostly
11 Apple's designation. One example is Docket Number 180, which is
12 an administrative motion to seal by Mr. Kannan. That was filed on
13 November 5th. Mr. Kannan says, I'm only marking this under seal
14 because Apple says it's supposed to be designated that way. I
15 don't think it's necessary.

16 In that situation, our Local Rule 795.E(1) (ph) requires the
17 designating party to file a declaration supporting the claim that
18 the document needs under seal treatment. And so some of these
19 motions -- and this is just an example -- some of these motions,
20 I don't have the supporting declaration in this case of Apple.

21 I'm going to decide these administrative motions by the end
22 of the week. I will give you an opportunity to file your
23 declarations. You need to review your administrative motions.
24 I'm not giving you an exhaustive list. But if someone has failed
25 to file a declaration, you need to remedy that right away because,

1 otherwise, that's a sort of automatic, you know, failure to
2 support the administrative motion to seal.

3 So I just noted that and wanted to give you a head's-up about
4 that. That needs to be fixed.

5 All right. I think that's it. I will issue a written order
6 on these two motions and I will also issue a written order on the
7 more miscellaneous matters that I've just reviewed with you.

8 All right. Anything further at this time?

9 MR. BOYER: No, Your Honor.

10 THE COURT: Okay. Thank you very much.

11 (Proceedings adjourned at 11:13 a.m.)
12

13 I, Peggy Schuerger, certify that the foregoing is a
14 correct transcript from the official electronic sound recording
15 provided to me of the proceedings in the above-entitled matter.

16
17 
Signature of Approved Transcriber

November 21, 2019
Date

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